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No. 03-531

In The

Supreme Court of the United States

YARDARM RESTAURANT, INC.,

Petitioner,

v.

THE CITY OF POMPANO BEACH,

Respondent.

On Petition For A Writ Of Certiorari
To The District Court Of Appeal Of Florida,
Fourth District

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The National Association of Home Builders ("NAHB") respectfully requests leave from this Court to file the attached brief as *amicus curiae* in support of the Petitioner's request for a writ of certiorari. A letter of consent for filing of the brief from Petitioner has been filed with the Clerk of the Court. The City of Pompano refused to stipulate to the filing of *amicus curiae* briefs and has neither consented to, nor denied consent for, the filing of this brief.

NAHB wishes to bring to the Court's attention differing theories on when a property right exists for Constitutional purposes and to explain why the court below was incorrect in following the 11th Circuit's substantive due process analysis.

NAHB represents over 211,000 builder and associate members throughout the United States. Its members include not only individuals and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Many of NAHB's members own and develop land. Therefore, NAHB is knowledgeable of the inequitable regulatory actions and time-consuming processes that are often involved with land development.

NAHB has been before the Court as an *amicus curiae* or as "of counsel" to the landowner in a host of critical land regulation cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co.*

v. City of San Diego, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, 122 S. Ct. 1465 (2002); *Borden Ranch Partnership v. United States Army Corps of Engineers*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003).

As a result, NAHB believes that it will provide the Court with particular insight into the issues presented by this case.[1]

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[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. The brief was not written in whole or part by counsel for a party, and no one other than amicus made monetary contribution to its preparation.

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INTRODUCTION

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1. This Court has developed an interpretation of the Due Process clause that protects one's basic substantive rights, in addition to the right to process. "Substantive due process" guarantees that a state cannot take away a person's life, liberty or property without appropriate governmental justification, regardless of the government's procedures. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) (explaining that the due process clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them . . ."); *Gundling v. Chicago*, 177 U.S. 183, 188 (1900) (explaining that it is possible for a state to deprive property rights by unreasonable legislation); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (recognizing that "liberty" means more than a person's right to be free from incarceration, but also to be free to "live and work where he will" and enter into proper contracts).

NAHB disagrees with the federal substantive due process interpretation of the Florida District Court of Appeals and urges this Court to grant certiorari to review two fundamental discrepancies occurring in that due process analysis.

First, when a claimant argues that the government has substantively deprived him of his property without due process of law, the claimant must initially prove that he has a property right that the Constitution protects. *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 260 (1987). The

Court should resolve the conflict among the circuits concerning whether land ownership is a property right worthy of federal substantive due process protections.

Second, the Court should clarify that executive actions, in addition to legislative decisions, qualify for review for federal substantive due process violations. The court of appeals in Florida has decided that property rights subject to government action by an administrative body are not worthy of such constitutional protections. *City of Pompano Beach v. Yardarm Rest., Inc.*, 834 So.2d 861, 869 (Fla. App. 4 Dist. 2002) (finding that "substantive due process protects against arbitrary legislative action, not arbitrary executive action."). While courts may disagree on the standard of review for substantive due process violations in the land use context, the lower court's wholesale limitation on considering administrative actions is contrary the holdings of most state and federal courts, including this Court. A severe limitation of this type on constitutional protections is an important federal question that must be addressed by this Court.

ARGUMENT IN SUPPORT OF GRANTING WRIT

I. Two Theories on Whether Real Property is Worthy of Constitutional Protection

Lower courts have developed two theories for determining whether tangible property deserves Constitutional protection under the Due Process Clause. The minority correctly explains that the ownership of property is a right protected by the Due Process Clause. The majority of courts, however, have incorrectly used the "entitlement approach" to determine whether a due process claimant has a protectable interest in tangible property.

In the case below, the plaintiff desired to construct a hotel and marina on its property and sought the necessary permits to do so. The court below, following the majority and the 11th Circuit, concentrated its due process property right analysis on whether Yardarm had a vested right in the building permits it was seeking. *Yardarm*, 834 So.2d at 866-7. Without deciding whether Yardarm possessed a vested right, the Florida District Court of Appeal, held that because the permit sought was created by state law, Yardarm had no substantive due process claim. *Id.* at 870.

A. The "Entitlement Approach"

1. *Roth* and *Perry*

In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), a state university dismissed a professor after one year of employment. The professor claimed that the university violated his due process rights by punishing him for asserting his right to free speech, and by not providing him with reasons for his dismissal and a hearing to respond. In determining whether the professor had a

property interest in his continued employment, this Court concluded that it is "clear that property interests protected by procedural due process extend *well beyond actual ownership* of real estate, chattels, or money." *Id.* at 571-72 (emphasis added). However, because the professor was asserting that he had a right in his employment, the Court further explained that "to have a property interest in a *benefit*, a person . . . must . . . have a legitimate claim of entitlement to it." *Id.* at 577 (emphasis added).

In a companion case, *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), which was based on similar facts, the Court reiterated that one has a property interest in a benefit if "there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit . . . ."

2. "Entitlement" in Land Use

Taken together, *Roth* and *Perry* have spawned the "entitlement approach" to determine whether a person has a property right protected by the Constitution. Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation,* 3 Wash. U. J.L. & Pol'y 61, 78 (2000); Kenneth B. Bley, Tina R. Axelrad, *The Search for Constitutionally Protected "Property" In Land-Use Law*, 29 Urb. Law. 251, 265-68 (1997). The "entitlement approach" requires an examination of the claimant's degree of entitlement to whatever property right he is asserting.

In land use cases, the entitlement analysis often translates into the court determining the degree of discretion the regulating body has to deny the owner's development. If the regulating body has discretion to deny development, then no property interest exists. *See, e.g., Macone v.*

Town of Wakefield, 277 F.3d 1, 9 (1st Cir. 2002) (providing that because the regulating body had discretion to rescind its approval, the landowner had no property interest); *Harlen Associates v. Incorporated Village of Mineola*, 273 F.3d 494, 504 (2nd Cir. 2001) ("As a general rule 'entitlement turns on whether the issuing authority lacks discretion to deny the permit . . . .'") (citation omitted); *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 641-42 (6th Cir. 2001) (*rev'd* on other grounds) (explaining that in matters where the regulating body has discretion to grant or deny a permit, property owners do not have a legitimate claim of entitlement to it, and therefore have no property interest); *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997) ("A claim to entitlement arises . . . when a statute or regulation places substantial limits on the government's exercise of its licensing discretion."); *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1380 (11th Cir. 1994) (providing that a property owner has a right in a permit when the factors for equitable estoppel are present); *George Washington Univ. v. District of Columbia*, 318 F.3d 203, 208-9 (D.C. Cir. 2003) (finding a property interest existed because the regulating body's discretion was substantially limited); *See also Spinell Homes, Inc. v. Municipality of Anchorage*, 2003 WL 21994972, at *8 (Alaska Aug. 22, 2003) (explaining that because the municipality did not have a mandatory duty to issue unconditioned permits and certificates, property owner could not establish that it had a protected property interest); *Tri County Landfill Ass'n, Inc. v. Brule County*, 641 N.W.2d 147, 152 (S.D. 2002) ("in order to demonstrate it held a protected property interest, [landowner] must show that [regulating body] did not have the discretion to deny its permission" to develop).

By focusing on a property owner's degree of entitlement to use his or her property, these courts have ignored the property interest baseline that this Court established in *Roth*: "ownership of real estate, chattels, or money."[1]

B. Ownership is a Protectable Right

When analyzing whether a due process claimant possesses a protectable property interest, the Third and Seventh Circuits, and some state courts, have correctly focused on the claimant's relationship to the tangible property in question. For example, in *DeBlasio v. Zoning Bd. of Adjustment for West Amwell*, 53 F.3d 592 (3rd Cir. 1995), a landowner brought a substantive due process action claiming that a township's zoning board violated his rights when it denied him a variance. The Third Circuit explained that to have an actionable substantive due process claim, the claimant must possess a property interest worthy of constitutional protection. *Id.* at 598. Ownership, according to the court, "is a property interest worthy of substantive due process protection." *Id.* at 600. Furthermore, the Third Circuit stated that it did not believe that this Court's jurisprudence mandated the use of the entitlement approach. *Id.* at 600 n.9.

The Seventh Circuit has also documented a similar approach. In *River Park, Inc. v. City of Highland*, 23 F.3d 164 (7th Cir. 1994), the plaintiff claimed that the city violated its due process rights by refusing to re-zone its property. In conducting his due process analysis, Judge Easterbrook explained that the plaintiff

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[1] The trial court in this case noted that the rights involved in using one's property "are more fundamental than mere employment interests." *Yardarm Restaurant v. City of Pompano Beach*, No. 87-19652(18) (Fla. Cir. Ct. Feb. 23, 1989).

> surely had a property interest in the land, which it owned in fee simple, and it is therefore entitled to contend that the City's regulation of that land deprived it of property without due process. The references to "property" in the Constitution reflect its Lockean heritage. The founding generation viewed "property" in concrete terms—land and chattels acquired by the investment of effort or purchase from another. An owner may build on its land; that is an ordinary element of a property interest. Zoning classifications are not the measure of the property interest but are legal *restrictions* on the use of property. Licenses, permits and classifications are important to owners because they reflect governmental promises not to interfere with private uses of property, but let us not confuse a decision not to interfere with the property itself.

Id. at 166 (citations omitted). *See Polenz v. Parrott*, 883 F.2d 551, 556 (7th Cir. 1989) (explaining that when a landowner challenges a zoning regulation on due process grounds, "the property interest in such a case is apparent—it is the ownership interest in the land itself . . ."); *See also Teer v. State,* 738 N.E.2d 283, 289 (Ind. Ct. App. 2000) (explaining that ownership of a handgun is a "property interest protectible under substantive due process . . ."); *Dale v. Town of Elsmere*, 702 A.2d 1219 (Del. 1997) (providing that ownership of property is worthy of substantive due process protection).

Thus, though these courts acknowledge that a state may regulate the use of property, they correctly focus their property interest analysis on the claimant's relationship to the property in question, not on the restrictions imposed by the state. And these courts have correctly concluded that ownership is a property interest that the Constitution protects.

II. Disagreement Over the Review of Executive Acts That May Rise to the Level of Substantive Due Process Violations

A. Most Federal Courts Agree That Executive Acts are Reviewable

A majority of the federal courts of appeal agree that conduct of a government official or non-legislative activity may be egregious enough to be in violation of substantive due process.

For example, in deciding whether the imposition of a five-year eligibility term for parole was a due process violation, the Third Circuit followed this Court in *Foucha v. Louisiana,* 504 U.S. 71 (1992), by holding that

> 'the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them.' *Id.* at 80, (internal quotation omitted).

Hunterson v. DiSabato 308 F.3d 236, 248 (3rd Cir. 2002). *See also Miller v. City of Philadelphia*, 174 F.3d 368 (3rd Cir. 2000) (determining that actions taken by a

social worker acting to separate a parent and a child were not arbitrary in the constitutional sense such that substantive due process rights were violated).[2]

In the context of another child abuse administrative action, the Fifth Circuit has dispensed with the property interest analysis in holding that

> a plaintiff whose claim is not susceptible to proper analysis with reference to a specific constitutional right may still state a claim under § 1983 for a violation of his or her Fourteenth Amendment substantive due process right, and have the claim judged by the constitutional standard which governs that right. *Petta v. Rivera,* 143 F.3d 895, 901 (5th Cir.1998). [T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing its power, or employing it as an instrument of oppression. *Collins v. City of Harker Heights, Texas,* 503 U.S. 115, 126, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (quotation omitted).

Morris v. Dearborne, 181 F.3d 657, 668 (5th Cir. 1999) (internal quotations omitted)

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[2] In fact the Third Circuit goes so far as to point out that non-legislative government deprivation that comports with procedural due process still might give rise to a substantive due process claim upon allegations that the government deliberately and arbitrarily abused its power. *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 139 (3rd Cir. 2000).

The Sixth and Second Circuits are equally clear that the substantive due process right to be free of arbitrary and capricious action by government actors may be violated by executive or administrative action. *See Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001) (*rev'd* on other grounds) (reviewing denial of a site plan for arbitrary executive action); *Bowers v. City of Flint*, 325 F.3d 758 (6th Cir. 2003) (finding that the property right in a discounted water bill was not appropriate for a substantive due process claim, but that executive actions related to certain property rights may be egregious enough for due process review); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) (determining the standard for reviewing action by school officials).

To take the analysis one step further, many courts draw a distinction between legislative and executive actions when determining whether the government action is fatally arbitrary. The Fourth Circuit agrees that executive actions are reviewable, and in its analysis encouraged courts to "look to history for whatever it may reveal about traditional executive practices and judicial responses in comparable situations by way of establishing context for assessing the conduct at issue." *Hawkins v. Freeman*, 195 F.3d 732, 738 n.1 (4th Cir. 1999). In applying standards of review, the Eighth Circuit has held that abusive executive action may include shocking conduct, conduct intended to injure that is unjustified by any government interest, or conduct that shows a "deliberate indifference" to protected rights. *Putnam v. Keller*, 332 F.3d 541 (8th Cir. 2003). Regardless of the standards utilized, the courts do review executive acts for substantive due process violations by some criteria.

It is no surprise that these courts agree on executive actions in this context. The foundation for this argument is this Court's holding that

> While due process protection in the substantive sense limits what government may do in both its legislative and its executive capacities, criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of governmental officer that is at issue.

County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (citations omitted). This Court intended for due process rights to be protected and for courts to review government actions that may abuse those rights.

B. The 11th Circuit and Florida Courts are Drawing an Improper Conclusion About Executive Activity

The *Yardarm* case punctuates the mistaken application of federal due process law in Florida. The appeals court held that the "substantive due process claim fails as a matter of law, because no evidence was presented that the acts were done in a legislative, rather than an executive capacity." *Yardarm*, 834 So.2d at 869.

The court relies on precedent from the 11th Circuit, which follows a line of reasoning that deprivation of rights must be focused on the general population and not a small group of individuals. Therefore, a non-legislative deprivation of rights could never result in a successful substantive due process claim. This line of 11th Circuit and Florida cases is wrong for two reasons – not only does

it mischaracterize the property interest, as discussed *supra*, but it also improperly excludes executive actions.

In *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), the court relies on *Greenholtz v. Inmates of Neb. .Penal & Correctional Complex*, 442 U.S. 1 (1979) as its basis for artificially distinguishing between legislative and non-legislative acts. While *Greenholtz* deals with the concept of entitlement in the context of the right to parole of a convicted person, the 11th Circuit in 1994 simply misconstrued the case to find an intention of this Court to preclude review of *any* executive actions. As stated previously, this concept has been clarified in the *Lewis* case, and in subsequent examinations of this issue by federal courts. However, the *Yardarm* court relies heavily on *McKinney*, to conclude that administrative actions are not reviewable, and on *Reserve v. Town of Longboat Key*, 933 F.Supp. 1040 (M.D.Fla. 1996), to find that the actions in the *Yardarm* situation are purely executive in nature.

A substantive due process claim under 42 U.S.C. § 1983 may be dependent on the degree of conduct but not the number of people affected. Such a contention is beyond the bounds of credibility in a constitutional sense. Due process violations of any kind may affect the rights of one person. *Cf. Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000) (holding that equal protection claims may be brought by a "class of one"). Clearly, the framers of the U.S. Constitution and the judicial system did not intend to protect liberties of only large groups of people.

CONCLUSION

The U.S. Constitution does not allow a state to deprive a citizen of his property without due process of law. Many courts are depriving landowners of their due process rights by finding that they have no right to use their property. Nevertheless, some courts have correctly acknowledged that property ownership is a right protected by the Constitution.

Once a property interest is established it is necessary for a court to review the government's action to determine whether it gives rise to a due process violation. The nature of the action, as administrative instead of legislative, may affect the standard imposed but should not preclude judicial review altogether.

This Court should grant certiorari in this matter to make clear that ownership of property is an interest protected by the U.S. Constitution. In addition, the Court should grant certiorari to clarify for the Florida courts that federal constitutional rights may be violated by executive actions of state or local governments.

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